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No. 82-963

In the Supreme Court of the United States

October Term, 1983

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

vs.

OSBORNE SHEPPARD,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF AMICI CURIAE, THE STATE OF ARKANSAS AND GULF & GREAT PLAINS LEGAL FOUNDATION, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amicus the State of Arkansas, as a sovereign state, has a strong interest in the outcome of this case. In maintaining a rational and effective system of criminal justice, the state has a strong concern for protecting its citizens from criminal activity, as well as in seeing that the constitutional right of its citizens to be free of unreasonable searches and seizures is safeguarded.

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the maintenance of a rational system of criminal justice, the preservation of the free enterprise system, and the protection of individual and constitutional rights. The Foundation has appeared as amicus curiae in a number of cases before this Court, including several cases relating to criminal and constitutional law.

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SUMMARY OF ARGUMENT

The Court has granted certiorari in three cases—*Massachusetts v. Sheppard, Colorado v. Quintero,* and *U. S. v. Leon*—which all present the potential of creating a "good faith" exception to the exclusionary rule. Constitutional jurisprudence prior to *Mapp v. Ohio,* 367 U.S. 643 (1961), expressly negatived any assumption that the exclusionary rule was mandated by the Fourth Amendment as applied to the states by the Fourteenth Amendment. The holding in *Mapp* that the exclusionary rule was constitutionally required by the Fourth Amendment was

agreed to only by four justices, and subsequent decisions of this Court have undermined any basis for the position that the exclusionary remedy is constitutionally required. The Court has refused to apply it in situations where it would have been applied had it been of constitutional dimension, and has refused to apply it retroactively, both of which are inconsistent with the notion that it is constitutionally mandated. Several justices have expressly stated that the exclusionary remedy is not of constitutional dimension, and this view is concurred in by the current President and a number of members of Congress.

Empirical research regarding the deterrent effect on the police of the exclusionary rule is inconclusive at best. However, the serious costs imposed by the exclusionary rule are virtually indisputable. Most serious among these are the freeing of dangerous criminals, the lack of proportionality between the violation and the remedy, and the consequent disrespect for the administration of justice which is engendered by the exclusionary rule.

Given the extreme complexity of Fourth Amendment search and seizure law, it is unrealistic to expect police officers to be able to apply it flawlessly under the difficult conditions in which they must work. Furthermore, the deterrence rationale for the exclusionary rule loses much of its force when good faith on the part of police officers is present. An exception to allow illegally seized evidence to be admitted would significantly improve the truth-seeking function of criminal trials, and diminish the degree to which the guilty go free. A more flexible test, in which factors such as the seriousness of the Fourth Amendment violation, the seriousness of the crime, and the centrality of the evidence in question could be considered, would provide a much-needed balance between the enforcement of the Fourth Amendment and the protection of society.

ARGUMENT

I. THE EXCLUSIONARY RULE IS A JUDICIALLY CREATED REMEDY ONLY, AND IS NOT CONSTITUTIONALLY MANDATED TO PROTECT FOURTH AMENDMENT RIGHTS.

Each of the three cases in which the Court has granted certiorari—*Massachusetts v. Sheppard, Colorado v. Quintero, and U. S. v. Leon*—presents in different form a similar issue: must evidence obtained contrary to the Fourth Amendment's protections against unreasonable searches and seizures automatically be excluded, or might an exception be made where the police officer acted reasonably and in good faith? Critical to the resolution of this issue is an examination of the constitutional and theoretical underpinnings of *Mapp v. Ohio*, 367 U.S. 643 (1961), the case which first imposed the exclusionary rule on the several states. *Mapp* purported to find a constitutional basis for the application of the exclusionary rule to the states. If the exclusionary rule is rooted in the Constitution, a considerably different question is presented than if the rule is merely one of practical expediency, which may be changed according to the lessons of experience. This brief will demonstrate that, in the light of constitutional jurisprudence before and after the *Mapp* decision, the attempt in *Mapp* to ground the exclusionary rule in the Fourth Amendment stands out as an anomaly. Logic and this Court's other decisions show that the exclusionary rule is only one means which may be used to ensure that the Fourth Amendment's guarantees will be respected, and is not itself constitutionally mandated. As such, it may be modified by the Court to bring it in harmony with the dictates of experience and the ends of justice.

Before analyzing *Mapp* and subsequent decisions, a brief review of the prior history of the exclusionary rule may be helpful.

For the first century of our nation's existence, neither this Court nor the other federal courts held that the suppression of improperly obtained evidence in criminal trials was either necessary or proper to implement the Fourth Amendment protections against unreasonable searches and seizures. The first intimation that such evidence might be suppressed under the Fourth Amendment came in *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd* held that, in a federal proceeding, certain individuals could not be compelled by order of the court to produce private papers which would be incriminating to them. Though the Court discussed the Fourth Amendment at some length, the case appeared to be decided principally upon Fifth Amendment grounds, since no actual search or seizure had taken place. Nevertheless the case is significant as providing the first suggestion, halfway through the history of this country, that pertinent evidence might be withheld on Fourth Amendment grounds in a proceeding related to enforcement of criminal statutes.

It is significant that, eighteen years later, the Supreme Court in reviewing a criminal prosecution expressly reaffirmed the existing common law rule that a trial court has no justification under the Fourth Amendment for inquiring into the means by which evidence was obtained. *Adams v. New York*, 192 U.S. 585 (1904). *Adams* expressly distinguished *Boyd* as a Fifth Amendment case, and the authorities cited in *Adams* show that this refusal to suppress valid evidence was the uniform and prevailing rule.

Weeks v. United States, 232 U.S. 383 (1914), is widely regarded as the case which first applied the exclusionary

rule to federal agencies. In that case, the defendant's personal effects and papers had been seized by government agents without a warrant, and not pursuant to an arrest. The defendant filed a petition to have such property returned to him prior to the trial. The Supreme Court held that the refusal by the trial court to return all of such effects and papers violated the Fourth Amendment. The Supreme Court recognized the rule in *Adams* that the trial court should not inquire into the origin of evidence at trial, but held that the defendant had the right prior to trial to have his property returned to him. The practical effect, therefore, was to prevent the use of such evidence at trial.

The Fourth Amendment's guarantee against unreasonable searches and seizures was extended to the states through the Fourteenth Amendment only as recently as 1949. In the case which created that extension, *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court nevertheless expressly refused to impose a requirement on the states that the Fourth Amendment be implemented through the remedy of the exclusionary rule. The Court enumerated the common law and statutory protections then provided by the states to punish and deter Fourth Amendment violations, and to compensate victims of such violations, and concluded:

> Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. *Id.* at 31.

The Court held that the exclusionary remedy established in *Weeks* was a "matter of judicial implication" and was "not derived from the explicit requirements of the Fourth Amendment." *Id.* at 28. Noting that men "with a complete devotion to the right of privacy" might differ regarding the need for the exclusionary rule, and that most of the English-speaking world does not regard that remedy as vital to such protection, the Court decided that it must "hesitate to treat this remedy as an essential ingredient of the right." *Id.* at 28-29.

To the extent that *Wolf* refused to impose such a requirement on the states, it was overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961). Though the effect of *Mapp* was clearly to impose a requirement on the states that they employ the exclusionary rule, it is noteworthy that in *Mapp* only four Justices found that the exclusionary remedy itself was compelled by the Fourth Amendment. Justice Stewart concurred in the result without reaching "the merits of the constitutional issue which the Court today decides." *Id.* at 672. Justices Harlan, Frankfurter and Whittaker filed a strong dissent. Justice Black, concurring in result, stated that he was:

> not persuaded that the Fourth Amendment standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. *Id.* at 661-662.

Justice Black based his concurrence on a joint interpretation of the Fourth and Fifth Amendments. *Id.* at 662. It is

significant that Justice Black had concurred in the *Wolf* decision, that his unique interpretation in *Mapp* failed to garner support in later decisions of the Court, and that in later decisions he made it clear that his concurrence in *Mapp* was based upon the Fifth Amendment, not the Fourth. As he stated in dissent in *Coolidge v. New Hampshire*, 403 U.S. 443, 496-97:

> The Fourth Amendment prohibits unreasonable searches and seizures. The Amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as the remedy for violation. * * * The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence.

See also, e.g., Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting); *Bumper v. North Carolina*, 391 U.S. 543, 560 (1968) (Black, J., dissenting); *Simmons v. United States*, 390 U.S. 377, 397 (1968) (Black, J., concurring and dissenting).

On several occasions since *Mapp*, the Court has drawn a distinction between the finding of a Fourth Amendment violation, and the appropriate remedy for that violation. Speaking for the Court, Justice Rehnquist recognized a distinction urged by the Government between "[w]hat is necessary to establish a . . . constitutional violation and what is necessary to support a suppression remedy once a violation has been established." *Scott v. United States*, 435 U.S. 128, 135 (1978). The Court has indicated that the exclusionary rule is only a "judicially created remedy" rather than a "personal constitutional right." *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974). If the exclusionary rule were

part and parcel of the Fourth Amendment, and created a personal constitutional right in every person who was the victim of an illegal search or seizure, then the fruits of the search or seizure should not be able to be used against him in any type of proceeding. But the Court has almost uniformly refused to extend the exclusionary rule to situations other than criminal trials. *See, e.g., Stone v. Powell*, 428 U.S. 465, 482 (1976) (habeas corpus proceedings); *United States v. Janis*, 428 U.S. 433, 454 (1976) (civil suit by government); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (grand jury proceedings).

Even in a criminal trial, the remedy of exclusion is not absolute. *United States v. Havens*, 446 U.S. 620 (1980) (impeachment of statements made by defendant on cross-examination); *United States v. Ceccolini*, 435 U.S. 268 (1978) (voluntary testimony by live witnesses). In several major cases, the Court has also declined to give retroactive effect to the exclusionary rule when decisions of the Court have extended the reach of Fourth Amendment protections. *Williams v. United States*, 401 U.S. 646 (1971); *Desist v. United States*, 394 U.S. 244 (1969); *Linkletter v. Walker*, 381 U.S. 618 (1965). None of the holdings of these cases is consistent with the theory that the exclusionary rule is of constitutional dimension.

If the exclusionary rule were of constitutional dimension, it would certainly be beyond the power of Congress to change it. However, as long ago as 1971, the Chief Justice called upon Congress to pass a statute providing, *inter alia*, "that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 423 (1971) (Burger, C.J., dissenting). In *Wolf*, 338 U.S. at 33, Mr. Justice Frankfurter expressly

recognized that a "different question" would be presented if Congress were to pass a statute purporting to negate the *Weeks* doctrine as it respects federal agencies, or if Congress attempted to make the exclusionary rule binding upon the states by statute. In the same case, Mr. Justice Black, concurring, stated that he felt it to be the "plain implication" of the Court's opinion that the exclusionary rule is "not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 39-40.

The President and at least certain members of Congress are of the same view. On March 18, 1982, Senators Thurmond and DeConcini introduced on behalf of the Administration a bill to provide a good faith exception to the exclusionary rule. 128 Cong. Rec. S2417 (daily ed. March 18, 1982). On September 13, 1982, the Criminal Justice Reform Act of 1982 was introduced in the Senate on behalf of the Administration. Among other things, it also contained a statutory good faith exception. 128 Cong. Rec. S11338 (daily ed. Sept. 13, 1982). The message by President Reagan accompanying that bill noted that although "the argument for retaining the exclusionary rule in any form is, at best, tenuous" the bill would at least eliminate application of the rule "in those cases in which it most clearly has no deterrent effect." *Id.* Though this Court is, of course, the final arbiter of whether the exclusionary rule is constitutionally based, the rule announced in *Mapp* that it is constitutionally required appears to have received as little credence in the executive and legislative branches as it has implicitly received in the later decisions of the Court.

In summary, the exclusionary rule is a rather late development in Fourth Amendment jurisprudence, and the leading case, *Mapp v. Ohio*, contained no clear or persuasive

constitutional mandate for the remedy of exclusion. Subsequent court opinions have emphasized that the exclusionary rule does not create a personal constitutional right, but is instead merely a judicially created remedy. The Court has, for the most part, declined to extend that remedy into areas other than the direct admission of evidence in criminal prosecutions. The reasonable inference is that the exclusionary rule, having been created by the Court as a prudential remedy, can also be changed by this Court if the remedy is seen not to have achieved its main purpose, or is seen to have created other undesirable effects. We therefore turn to a discussion of the purposes underlying the rule, and the severe, negative consequences which it has created.

II. THE EXCLUSIONARY RULE DOES NOT ACCOMPLISH THE MAIN PURPOSES FOR WHICH IT WAS IMPLEMENTED, BUT INSTEAD LEADS TO MAJOR DYSFUNCTIONS IN THE CRIMINAL JUSTICE SYSTEM.

It is now well recognized that the overriding purpose of the exclusionary rule, if not its sole purpose, is the deterrence of illegal searches and seizures by police. In *Mapp v. Ohio*, 367 U.S. 643 (1961), Justice Clark stated that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). References have also been made to a supposed purpose of preserving "judicial integrity"—that is, preventing the judicial process from becoming sullied by the use of unconstitutionally obtained evidence. *See discussion in United States v. Peltier*, 422 U.S. 531, 536-39 (1975). However, most decisions have made it clear that the practical rationale for the exclusionary rule is

deterrence, and that the rule must survive or fall on that basis. *See, e.g., United States v. Janis*, 428 U.S. 433, 446-54 (1976).

Though a number of empirical studies have been performed to determine whether the exclusionary rule does in fact deter illegal conduct, the results have been inconclusive. One of the more comprehensive empirical studies examined statistics and other facts relating to Motions to Suppress in the city of Chicago over a twenty-year period. J. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973). The study covered the years 1950-1970, a period almost evenly divided between the pre-*Mapp* and post-*Mapp* years. The author questioned whether the exclusionary rule in fact had any deterrent effect on police officers, noting that "[t]he individual police officer who is involved in a Motion to Suppress often leaves the courtroom confused rather than clarified as to what his proper conduct should be." *Id.* at 276. Perhaps the most thoroughgoing of such studies is D. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970). This study reviewed most of the empirical data which had previously been published on this subject, together with certain new data. The author concluded that the data provided "little support for the proposition that the exclusionary rule discourages illegal searches and seizures . . . ." *Id.* at 667. The article closes with a call for the abolition of the exclusionary rule. *Id.* at 754.

In this respect, little has changed in the thirty-five years since *Wolf* was decided. In 1954, Mr. Justice Jackson stated: "What actual experience teaches we really do not know." *Irvine v. California*, 347 U.S. 128, 135 (1954). One year prior to the *Mapp* decision, Mr. Justice Stewart ad-

mitted that "empirical statistics are not available" to show that the exclusionary rule deters unlawful searches and seizures. *Elkins v. United States*, 364 U.S. 206, 218 (1960). After reviewing the literature, Mr. Justice Blackmun, writing for the Court, more recently expressed serious doubts about the empirical underpinnings of the rule. *United States v. Janis*, 428 U.S. 433, 446-54 (1976).

On the other hand, it has become increasingly clear that the exclusionary rule has a number of severe adverse consequences. One leading commentator on the exclusionary rule, Judge Malcolm R. Wilkey of the Court of Appeals for the District of Columbia, has identified no fewer than twelve separate costs of the exclusionary rule. Judge Wilkey's list is as follows:

1. "The criminal is to go free because the constable has blundered."

2. Only the undeniably guilty benefit from the exclusionary rule, while innocent victims of illegal searches have neither protection nor remedy.

3. The exclusionary rule in any form vitiates all internal disciplinary efforts by law enforcement agencies.

4. The disposition of exclusionary rule issues constitutes an unnecessary and intolerable burden on the court system.

5. The exclusionary rule forces the Judiciary to perform the Executive's job of disciplining its employees.

6. The misplaced burden on the Judiciary deprives innocent defendants of due process.

7. The exclusionary rule encourages perjury by the police.

8. The exclusionary remedy makes hypocrites out of judges.

9. The high cost of applying the exclusionary rule causes the courts to expand the scope of search and seizure for all citizens.

10. The exclusionary rule is applied with no sense of proportion to the crime of the accused.

11. The exclusionary remedy is applied with no sense of proportion to the misconduct of the officer.

12. All of the above costs result inevitably in greatly diminished respect for the judicial process, lawyers and laymen alike.

See M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule* (National Legal Center for the Public Interest, 1982) [*reprinted* at 95 F.R.D. 211 (1982)]; M. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. Tex. L. J. 531 (1982).

The Court itself has identified five major costs of the exclusionary rule in *Stone v. Powell*, 428 U.S. 465, 489-91 (1976). The Court considered the following five costs to be "well known":

1. "[T]he focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."

2. "[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."

3. Application of the rule "deflects the truth finding process and often frees the guilty."

4. "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is

contrary to the idea of proportionality that is essential to the concept of justice."

5. Because of these costs, the rule may have the "effect of generating disrespect for the law and administration of justice."

All of these costs identified by the Court and Judge Wilkey are significant. However, perhaps three costs are the most significant:

1. By suppressing reliable and oftentimes essential evidence, the rule allows guilty and dangerous criminals to go free;

2. By suppressing evidence regardless of the seriousness of the violation of Fourth Amendment rights, or the seriousness of the crime, the rule is contrary to the idea of proportionality that is essential to the concept of justice; and

3. By freeing dangerous criminals without regard to guilt, and diverting the inquiry at trial to technicalities, the rule generates disrespect for the law and the administration of justice.

The effect of a good faith exception or similar exception upon these costs will be discussed in Part III.

III. A GOOD FAITH EXCEPTION, OR BROADER EXCEPTION TAILORED TO PRACTICAL NEEDS AND THE NEED FOR A FAIR TRIAL, WOULD SUBSTANTIALLY REDUCE SOME OF THE MOST IMPORTANT COSTS OF THE EXCLUSIONARY RULE.

Of all of the many costs of the exclusionary rule, perhaps the single most serious is the societal cost of permitting unquestionably guilty criminals to go free on the

basis of abstruse technicalities. The literal impossibility of expecting police officers to interpret perfectly the arcane rules of search and seizure was vividly described in the message from the Assistant Attorney General which accompanied S. 2231, the bill to establish a good faith exception. That message mentioned the decision in *Robbins v. California*, 453 U.S. 420 (1981), and went on to state:

> In *Robbins*, the Court excluded evidence of a substantial quantity of marihuana found in a car trunk in a decision based largely on two previous cases, *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), neither of which had been decided at the time of the search in *Robbins* in 1975. The *Robbins* decision overruled previous decisions of the trial and appellate courts in California that the search was valid. When finally decided, 14 judges had reviewed the search; seven found it valid; seven invalid. To add to the confusion, less than three months after it decided *Robbins*, the Supreme Court granted certiorari in *United States v. Ross*, 102 S. Ct. 386 (1981) and asked both sides to address the question of whether *Robbins* should be reconsidered. It is unrealistic to think that the exclusionary rule can motivate even the most conscientious law enforcement officer to apply flawlessly the teaching of a body of law that the courts are still developing and debating, especially when the examination to test his knowledge is suddenly presented in a potential life or death situation. 128 Cong. Rec. S2417 (daily ed. March 18, 1982).

Given the inevitable complexity of Fourth Amendment search and seizure law, police officers must be given some degree of latitude in applying it. Justice White has forcefully argued for a "good faith" exception in his dissent in *Stone v. Powell*, 428 U.S. 465, 536 (1976). The Court

has also recognized that deterrence fails as a rationale when good faith is present:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. Michigan v. Tucker,* 417 U.S. 433, 447 (1974). [emphasis added]

An exception to the exclusionary rule which would allow evidence obtained in violation of the Fourth Amendment to be used at trial, when the officer's actions were performed reasonably and in good faith, would significantly improve the truth-seeking process in those areas where the law is unclear, or is subsequently changed. By doing so, it would substantially mitigate the serious cost of allowing criminals to go free, and thereby minimize the disrespect for the criminal process which this tangle of technicalities has produced.

The societal costs of the exclusionary rule are not of course limited to the actual victimization and increased crime caused by the freeing of criminals. Disrespect for the courts results when the public perceives that there is only an attenuated relationship between guilt and conviction. Survey data bear this out. In April of 1965, when the effects of the Supreme Court's constitutional reforms of criminal procedure were just beginning to be felt, only 48% of the American public believed that the courts did not deal harshly enough with criminals. Gallup Opinion

Index Rep., No. 33 (1968). By February of 1968 that figure had risen to 63%, and by March of 1969 had increased to 75%. Gallup Opinion Index Rep., No. 33 (1968); Gallup Opinion Index Rep., No. 45 (1969). According to figures cited by Attorney General William French Smith, the percentage of the public which felt that the courts do not deal harshly enough with criminals had reached 90% by 1981. Comment, 23 S. Tex. L. Rev. 693, 700, n. 57 (1982). Though the exclusionary rule is certainly not entirely responsible for this perception of undue judicial leniency, it cannot have failed to have contributed to it.

At present, the determination of a Fourth Amendment violation on a Motion to Suppress is automatically tied to the exclusionary remedy. If a violation is found, the evidence is suppressed. Creating a good faith exception would divorce the issues of (1) finding a violation, and (2) deciding whether the evidence should be admitted. Since a two-step process will therefore be necessary, amici would suggest that any exception created by this Court might well address more than the reasonableness and good faith of the officer's conduct. Specifically, a more flexible exception would allow the trial court to consider other factors which will bring some proportionality to decision-making in this area. For example, assuming a Fourth Amendment violation has been found, the trial court should be able to consider factors such as the following in deciding whether the evidence should be suppressed:

1. Despite the existence of a Fourth Amendment violation, was the action of the officer nevertheless taken reasonably and in good faith?

2. How central is the evidence in question to determining guilt or innocence?

3. How serious was the invasion of the defendant's Fourth Amendment rights?

4. How serious was the crime, and, if the charge were to be proven, how dangerous is the alleged offender likely to be to society?

There are many types of evidentiary determinations in which the trial court must weigh the probativeness and value of the evidence against extrinsic policy concerns. Amici suggest that if the exclusionary rule is to be retained, it would be much more salutary to create a similar rule in cases of alleged Fourth Amendment violations, so that the critical interests of protecting society can be weighed against the deterrence which the exclusionary rule seeks to advance.

It is perhaps not necessary for this Court to determine the exact content of such a test which could be applied by state courts. If the exclusionary rule is not constitutionally mandated, this Court is certainly empowered to formulate a remedy for the federal courts under its general supervisory powers. But, if the rule is not of constitutional dimension, it is difficult to ascertain what would authorize this Court to develop a detailed rule for state courts. The Court is obviously empowered to ensure that the states enforce the strictures of the Fourth Amendment, as applied to the states through the Fourteenth. Nevertheless, there is certainly a great deal of room for experimentation and differences in judgment as to the contours of the remedy or remedies to be implemented. Thus, if the exclusionary rule is to be retained as applied to the states, amici would urge the Court to do no more than establish general guidelines for the states to observe in establishing a good faith exception, or in establishing a more flexible exception which would diminish the present costs of the exclusionary rule.

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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